

Report of the Amateur Radio Legal Defense & Assistance Committee

Committee Members: Director Jim Pace, K7CEX (Chair), Vice Director Marty Woll, N6VI, Vice Director Jim Tiemstra, K6JAT, Vice Director, Mike Raisbeck, K1TWF, Member James O'Connell, W9WU, Director Mike Lisenco, N2YBB and General Counsel Chris Imlay, W3KD.

The committee has been in a holding pattern waiting for various decisions and filings by the parties in the below cases. As no action/vote has taken place during the first half of 2015, I present an update of pending issues:

ARRL Legal Counsel Chris Imlay, W3KD, provides the following:

**DePolo v. Board of Supervisors, Tredyffrin Township, PA USDC – Eastern District of PA.** On May 20, 2015 I informed the ARLDAC and the Executive Committee of a significantly adverse decision in an antenna case in which the Amateur plaintiff was represented professionally by ARRL Vice Director Bob Famiglio, K3RF. The case is now on appeal in the Third Circuit United States Court of Appeals. I have previously provided the Committee with a copy of the United States District Court's decision dismissing the case filed by Mr. Jeff DePolo, WN3A, on the basis of a Section 12(b)(6) motion to dismiss the case filed by the Township.

Before this decision was handed down by the U.S. District Court, DePolo had requested antenna case funding for the District Court case. I was preparing a case funding request memorandum for this case for the Committee's evaluation when this somewhat unexpected decision came down in May.

The facts are generally as follows, and they are more elaborately stated in the District Court opinion. Basically, DePolo moved to the Township in eastern PA and applied for a 180-foot tower and antennas mounted atop that in the face of an ordinance that permitted "buildings" (which in this case expressly included antennas) to be erected to a height limit of 35 feet as a matter of right. The Township, in view of the Pennsylvania State PRB-1 statute, offered DePolo a 65 foot tower permit (which it didn't seem to have

the authority to do under the ordinance as it reads) but DePolo asserted that the 180 foot antenna was the minimum necessary to do the communications he needed to do. Bob says that there was uncontroverted evidence of this from a registered P.E. (well known to me) by the name of Larry Will. Larry is a long time ham.

This case is aberrational because it was dismissed under Section 12(b)(6) of the Federal Rules of Civil Procedure: the failure to state a claim on which relief might be granted. As far as I can recall, this is the first time that a PRB-1 complaint was dismissed on a preliminary motion rather than on the merits. The trial judge's finding, in essence, was that the complaint, taken in the light most favorable to the plaintiff DePolo, failed to state a claim on which relief may be granted even though PRB-1 was argued on the face of the complaint and the facts were in dispute. That procedural move by the trial judge makes this case unique, and unfortunately the decision is likely to be certified for publication. It is not binding authority on any court anywhere but as a practical matter it is very adverse guidance in at least Pennsylvania and likely elsewhere. It holds, essentially, that all that a municipality is obligated to do is to offer to negotiate and compromise, and that such an offer (without more) is the essence of reasonable accommodation.

The case is rather odd for several other reasons, not the least of which is that the Township asserted that it had no authority to compromise on its 35 foot height limit (which, because it is an absolute height limit, in my view should have been enough to declare it preempted on its face, which is the reverse of the court's conclusion here) but it turned around and unilaterally offered 65 feet as an overall height limit based on the State PRB-1 law. The Court should not have found that the complaint failed to state a claim on which relief might be granted and then, in the same order, proceeding to adjudicate the facts of the case and interpret the FCC's reasonable accommodation standard. It is more like a summary judgment order, but no one filed a motion for summary judgment and no one argued that the facts were not in dispute. The judge adjudicated the facts that were in dispute himself.

**Myles Landstein v. Town of LaGrange, New York, Supreme Court of the State of New York for Dutchess County.** I received in March from Myles Landstein's attorney Jon Adams a draft verified complaint against the

Town based on two major issues: the cost prohibition on his antenna based on the Town's requirements of many thousands of dollars without a ceiling for consideration of an antenna permit and the fact that the Town does not recognize Amateur Radio antennas as a normal accessory use to residential real property. I provided Attorney Jon Adams with case law for the verified complaint and to prepare him for a response to a memorandum of law from the Town that required rebuttal.

**Legal Research Fund as of 06/2015:**

12/31/14 Balance	\$165,707	
Contributions	\$7,052	
Napa, CA-operating time restrictions	\$ (900)	
WN3A tower case	\$ (200)	
Draft zoning ordinance-case not cited	\$ (170)	
Howard County, MD zoning	\$ (150)	
West Palm Beach zoning	\$ (730)	
Detroit Suburban town	\$ (30)	
Famiglio antenna case	\$ (330)	
DePolo antenna case	\$ (150)	
6/30/15 Balance		170,099

Respectfully Submitted

James D. (Jim) Pace, K7CEX  
Chairman